No. 80-1247

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In the Supreme Court of the United States

OCTOBER TERM, 1980

CON ERRICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends that his conduct did not come within the reach of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. III) 1961 *et seq.*

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). He was sentenced to 10 years' imprisonment and a fine of $25,000. The court of appeals affirmed (Pet. App. 1a-9a).[1]

The evidence adduced at trial is summarized in the opinion of the court of appeals (Pet. App. 1a-7a). In brief, it showed that petitioner, a former jockey, was the "linchpin" (*id.* at 3a) of an association of jockeys and bettors organized for the purpose of fixing horse races at New York racetracks

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[1]The opinion of the court of appeals is reported at 635 F. 2d 152.

and wagering on the fixed races. The association remained in operation from at least December 1973 through March 1975.

In December 1973, petitioner approached jockey Jose Amy[2] at Aqueduct racetrack and offered to pay him to keep his horse out of the money in the trifecta race that day.[3] Amy refused. A few days later petitioner again unsuccessfully attempted to bribe Amy. Finally, petitioner told Amy that the other jockeys had agreed to hold horses, and he threatened "Mafia" retribution if Amy did not go along. Frightened by these threats, Amy agreed to cooperate, and petitioner paid him $1500 (Pet. App. 3a-4a).

During the next 16 months, petitioner bribed Amy and other jockeys to hold their horses on several occasions. By doing so, the jockeys made it possible for petitioner's circle of bettors to win substantial sums of money by betting on numerous trifecta combinations, all of which excluded the horses ridden by the bribed jockeys (Pet. App. 4a-5a).[4]

2. Petitioner contends (Pet. 3-4) that the conduct for which he was convicted does not fall within the RICO statute. He argues that RICO applies exclusively to legitimate "enterprises" that are subsequently infiltrated by criminal elements, and thus does not extend to the wholly illegitimate association of jockeys and bettors that was charged as the "enterprise" in this case.

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[2]Amy was the government's principal witness at trial.

[3]In a trifecta race, the winning bettor must pick the first three horses in exact order; accordingly, a bettor's chances of winning in any race are increased if he knows that certain horses will not place.

[4]For example, in the trifecta at Saratoga racetrack on August 2, 1974, Harry Kachougian won $91,560, and Salvatore Gannuseio won $45,780. In the December 6 trifecta at Aqueduct, Harold Hirsch collected $77,570, and in the December 9 Aqueduct trifecta Kachougian collected more than $129,000 (Pet. App. 4a-5a).

The issue raised here—whether a group of individuals associated in fact to commit unlawful acts for profit can constitute an "enterprise" under RICO—is currently before this Court in *United States* v. *Turkette*, cert. granted, No. 80-808 (Jan. 26, 1981). Accordingly, consideration of this petition should be deferred pending the Court's decision in *Turkette*.[5]

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1981

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[5]We also note that, as in *Turkette* (see U.S. Br. at 41-42 n.32), the illegal association in this case had a predatory effect on a legitimate business—here, the business of horse racing in New York. Unlike *Turkette*, however, petitioner's operation entailed the actual infiltration of the racing business through bribery of jockeys who were integral participants in that business. For this reason, even if the Court narrowly construes the RICO statute in *Turkette*, there would remain the question whether RICO is applicable to the corruption of the legitimate racing industry involved in this case. That issue, if necessary to be resolved after *Turkette*, should properly be considered by the court below in the first instance. See, *e.g.*, *Busic* v. *United States*, 446 U.S. 398, 412 n.19 (1980).